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Supreme Court of the United States

KIRBY INLAND MARINE, INC. OF MISSISSIPPI, f/k/a BRENT TRANSPORTATION COMPANY, *in personam* and the M/V MISS DIXIE, its engines, tackle, fixtures and appurtenances, etc., *in rem*,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Oregon* presumption of fault (158 U.S. 186) should not be applied when a moving vessel strikes a stationary railroad bridge that was previously determined by the United States Coast Guard to be an unreasonable obstruction to navigation under 33 U.S.C. § 512 of the Truman-Hobbs Act and remained unaltered?

2. Whether a prior declaration by the United States Coast Guard that a railroad bridge, which was struck by a moving vessel, is an unreasonable obstruction to navigation in violation of 33 U.S.C. § 512 triggers application of the competing *Pennsylvania* presumption of fault (86 U.S. 125) since the statute violated involves marine safety and navigation?

PARTIES TO THE PROCEEDING AND DISCLOSURE STATEMENT

Petitioner

Petitioner is Kirby Inland Marine, Inc. of Mississippi, f/k/a Brent Transportation Company, *in personam*, the ultimate parent company of which is publicly traded, and its vessel the M/V MISS DIXIE, its engines, tackle, fixtures and appurtenances, etc., *in rem*. Kirby Inland Marine, Inc. of Mississippi's parent corporation is Kirby Inland Marine, L.P. whose parent corporation is Kirby Corporation. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of Kirby Corporation's stock. Kirby Inland Marine, Inc. of Mississippi and the M/V MISS DIXIE were the defendants in the District Court and the Appellees before the Eighth Circuit Court of Appeals.

Respondent

Respondent is the Union Pacific Railroad Company of Delaware, which is not a publicly traded company. The Union Pacific Corporation is a publicly traded company owning more than ten percent (10%) of the stock of Union Pacific Railroad Company. The Union Pacific Railroad Company was the Plaintiff in the District Court and the Appellant before the Eighth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of *Certiorari* to review the judgment and order of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, which reversed in part and affirmed in part the decision of the District Court is reported at 296 F.3d 671 (8th Cir. 2002) and is in Appendix A. The decision of the District Court for the Southern District of Iowa, Davenport Division, is reported at 2001 WL 1689710 and 2001 A.M.C. 2857 and is in Appendix B. The decision of the Court of Appeals denying the petition for rehearing and in the alternative a rehearing *en banc* is contained in Appendix C.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on July 11, 2002. The Court of Appeals entered an Order denying a timely petition for rehearing *en banc* and, alternatively, for a rehearing by the panel on August 15, 2002.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

33 U.S.C. § 401. Construction of bridges, causeways, dams or dikes generally; exemptions

It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river,

or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for (1) the bridge or causeway shall have been submitted to and approved by the Secretary of Transportation, or (2) the dam or dike shall have been submitted to and approved by the Chief of Engineers and Secretary of the Army. However, such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army before construction is commenced. When plans for any bridge or other structure have been approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless modification of said plans has previously been submitted to and received the approval of the Secretary of Transportation or the Chief of Engineers and the Secretary of the Army. The approval required by this section of the location and plans or any modification of plans of any bridge or causeway does not apply to any bridge or causeway over waters that are not subject to the ebb and flow of the tide and that are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

33 U.S.C. § 512. Obstruction of navigation

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.

33 U.S.C. § 513. Notice, hearings, and findings

Whenever any bridge shall, in the opinion of the Secretary, at any time unreasonably obstruct such navigation, it shall

be the duty of the Secretary, after notice to interested parties, to hold a hearing at which the bridge owner, those interested in water navigation thereunder or therethrough, those interested in either railroad or highway traffic thereover, and any other party or parties in interest shall have full opportunity to offer evidence and be heard as to whether any alteration of such bridge is needed, and if so what alterations are needed, having due regard to the necessity of free and unobstructed water navigation and to the necessities of the rail or highway traffic. If, upon such hearing, the Secretary determines that any alterations of such bridge are necessary in order to render navigation through or under it reasonably free, easy, and unobstructed, having due regard also for the necessities of rail or highway traffic thereover, he shall so find and shall issue and cause to be served upon interested parties an order requiring such alterations of such bridge as he finds to be reasonably necessary for the purposes of navigation.

33 U.S.C. § 514. Submission and approval of general plans and specifications

After the service of an order under this subchapter, it shall be the duty of the bridge owner to prepare and submit to the Secretary of Transportation, within a reasonable time as prescribed by the Secretary, general plans and specifications to provide for the alteration of such bridge in accordance with such order, and for such additional alteration of such bridge as the bridge owner may desire to meet the necessities of railroad or highway traffic, or both. The Secretary may approve or reject such general plans and specifications, in whole or in part, and may require the submission of new or additional plans and specifications, but when the Secretary shall have approved general plans and specifications, they shall be final and binding upon all parties unless changes therein be afterward approved by the Secretary and the bridge owner.

33 U.S.C. § 516. Apportionment of cost

At the time the Secretary shall authorize the bridge owner to proceed with the project, as provided in section 515 of this title, and after an opportunity to the bridge owner to be heard thereon, the Secretary shall determine and issue an order specifying the proportionate shares of the total cost of the project to be borne by the United States and by the bridge owner. Such apportionment shall be made on the following basis: The bridge owner shall bear such part of the cost as is attributable to the direct and special benefits which will accrue to the bridge owner as a result of the alteration, including the expectable savings in repair or maintenance costs; and that part of the cost attributable to the requirements of traffic by railroad or highway, or both, including any expenditure for increased carrying capacity of the bridge, and including such proportion of the actual capital cost of the old bridge or of such part of the old bridge as may be altered or changed or rebuilt, as the used service life of the whole or a part, as the case may be, bears to the total estimated service life of the whole or such part: *Provided,* That in the event the alteration or relocation of any bridge may be desirable for the reason that the bridge unreasonably obstructs navigation, but also for some other reason, the Secretary may require equitable contribution from any interested person, firm, association, corporation, municipality, county, or State desiring such alteration or relocation for such other reason, as a condition precedent to the making of an order for such alteration or relocation. The United States shall bear the balance of the cost, including that part attributable to the necessities of navigation: *And provided further,* That where the bridge owner proceeds with the alteration on a successive partial bid basis the Secretary is authorized to issue an order of apportionment of cost for the entire alteration based on the accepted bid for the first part of the alteration and an estimate of cost for the remainder of the work. The Secretary is authorized to revise the order of apportionment of cost, to the extent he deems reasonable and proper, to meet any changed conditions.

33 U.S.C. § 519. Noncompliance with orders; penalties; removal of bridge

Any bridge owner who shall willfully fail or refuse to comply with any lawful order of the Secretary, made in accordance with the provisions of this subchapter, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished in any court of competent jurisdiction by a fine not exceeding $5,000, and every month such bridge owner shall remain in default shall be deemed a new offense and subject such bridge owner to additional penalties therefore. In addition to the penalties above prescribed the Secretary may, upon the failure or refusal of any bridge owner to comply with any lawful order issued by the Secretary in regard thereto, cause the removal of any such bridge and accessory works at the expense of the bridge owner; and suit for such expense may be brought in the name of the United States against such bridge owner and recovery had for such expense in any court of competent jurisdiction. The removal of any bridge erected or maintained in violation of the provisions of this subchapter or the order or direction of the Secretary made in pursuance thereof, and compliance with any order of the Secretary made with respect to any bridge in accordance with the provisions of this subchapter, may be enforced by injunction, mandamus, or other summary process upon application to the district court of any district in which such bridge may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Secretary.

33 C.F.R. § 116.01 General

(a) All bridges are obstructions to navigation and are tolerated only as long as they serve the needs of land transportation while allowing for the reasonable needs of navigation.

(b) This part describes the general procedures by which the U.S. Coast Guard determines a bridge to be an unreason-

able obstruction to navigation and issues an Order to Alter under the authority of the following statutes, as appropriate: Section 18 of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. 502; Section 4 of the Bridge Act of 1906, 33 U.S.C. 494; or the Truman-Hobbs Act of 1940, as amended, 33 U.S.C. 511-524.

(c) A bridge constructed across a navigable water of the United States shall not unreasonably obstruct the free navigation of the water over which it was constructed, either due to insufficient height or width of the navigation span, or because of difficulty in passing through the draw opening. If any bridge unreasonably obstructs navigation, the Commandant, U.S. Coast Guard, will order the alteration of that bridge. Alterations may include structural changes, replacement, or removal of the bridge.

(d) Whenever the Coast Guard has good reason to believe that a bridge across any of the navigable waters of the United States is an unreasonable obstruction to navigation, the Coast Guard will give notice to the owner of the bridge and other interested parties, and hold a public hearing at which the interested parties will have a full opportunity to be heard and to offer evidence on the question of whether alterations to the bridge are necessary and, if so, the extent of alterations needed.

(e) If the Coast Guard determines that alterations to a bridge are necessary, the Commandant, U.S. Coast Guard, will issue to the bridge owner an Order to Alter containing details of the alterations necessary to render navigation through or under the bridge reasonably free, easy, and unobstructed.

(1) In the case of a railroad or publicly owned highway bridge, an Order to Alter is issued to the bridge owner under the provisions of the Truman-Hobbs Act (33 U.S.C. 511 et seq.). In ordering these alterations, the Coast Guard will give due regard to the necessities of free and unobstructed navigation and of rail and highway traffic. For alterations to bridges governed by the Truman-Hobbs Act, the Coast Guard must approve general plans, specifications, and contracts for the alteration project, as well as

approving the apportionment of the total cost of the alterations between the United States and the bridge owner.

(2) For all other bridges, the Order to Alter will contain the required alterations for the bridge and will prescribe a reasonable time in which to accomplish the required alterations. The bridge owner is responsible for the entire cost of the required alterations.

33 C.F.R. § 116.10 Preliminary review

(a) Upon receipt of a written complaint, the District Commander will review the complaint to determine if, in the District Commander's opinion, the complaint is justified and whether a Preliminary Investigation is warranted.

(1) The District Commander's opinion as to whether or not the complaint warrants a Preliminary Investigation will be formed through informal discussions with the complainant, users of the affected waterway, the owner of the bridge, and other interested parties.

(2) In forming an opinion, the District Commander may also review the district files, records of accidents, and details of any additional written complaints associated with the bridge in question.

(b) In the absence of any written complaint, the District Commander may decide, based on a bridge's accident history or other criteria, to conduct a Preliminary Investigation.

(c) The District Commander will inform the complainant and the Chief, Office of Bridge Administration of the determination of any Preliminary Review. If the District Commander decides that the bridge in question is not an unreasonable obstruction to navigation, the complainant will be provided with a brief summary of the information on which the District Commander based the decision and will be informed of the appeal process described in § 116.55. There will be no further investigation, unless additional information warrants a continuance or reopening of the case.

33 C.F.R. § 116.15 Preliminary investigation

(a) During the Preliminary Investigation, the District Commander will prepare a written report containing all pertinent information and submit the report, together with a recommendation for or against the necessity of a Detailed Investigation, to the Chief, Office of Bridge Administration.

(b) The Preliminary Investigation Report will include a description of the nature and extent of the obstruction, the alterations to the bridge believed necessary to meet the reasonable needs of existing and future navigation, the type and volume of waterway traffic, and a calculation of the benefits to navigation which would result from the proposed bridge alterations.

(c) The Chief, Office of Bridge Administration will review the Preliminary Investigation Report and make a Preliminary Decision whether or not to undertake a Detailed Investigation and a Public Hearing.

(d) If after reviewing the Preliminary Investigation Report, the Chief, Office of Bridge Administration decides that further investigation is not warranted, the complainant will be notified of the decision. This notification will include a brief summary of information on which the decision was based and details of the appeal process described in § 116.55.

33 C.F.R. § 116.20 Detailed investigation

(a) When the Chief, Office of Bridge Administration determines that a Detailed Investigation should be conducted, the District Commander will initiate an investigation that addresses all of the pertinent data regarding the bridge, including information obtained at a public hearing held under § 116.25. As part of the investigation, the District Commander will develop a comprehensive report, termed the "Detailed Investigation Report", which will discuss: the obstructive character of the bridge in question; the impact of that bridge upon navigation; navigational benefits de-

rived; whether an alteration is needed to meet the needs of navigation; and, if alteration is recommended, what type.

(b) The District Commander will forward the completed Detailed Investigation Report to the Chief, Office of Bridge Administration for review together with a recommendation of whether the bridge should be declared an unreasonable obstruction to navigation and, if so, whether an Order to Alter should be issued.

33 C.F.R. § 116.25 Public Hearings

(a) Any time the Chief, Office of Bridge Administration determines that a Detailed Investigation is warranted, or when Congress declares a bridge unreasonably obstructive, the District Commander will hold a public hearing near the location of the bridge to provide the bridge owner, waterway users, and other interested parties the opportunity to offer evidence and be heard, orally or in writing, as to whether any alterations are necessary to provide reasonably free, safe, and unobstructed passage for waterborne traffic. The District Commander will issue a public notice announcing the public hearing stating the time, date, and place of the hearing.

(b) When a bridge is statutorily determined to be an unreasonable obstruction, the scope of the hearing will be to determine what navigation clearances are needed.

(c) In all other cases, the scope of the hearing will be to address issues bearing on the question of whether the bridge is an unreasonable obstruction to navigation and, if so, what alterations are needed.

(d) The hearing will be recorded. Copies of the public hearing transcript will be available for purchase from the recording service.

STATEMENT OF THE CASE

The facts of this case are uncomplicated and undisputed. On May 5, 1996, Kirby Inland Marine, Inc. ("Kirby") was the owner and operator of the M/V Miss Dixie, a river barge towboat in operation on the Mississippi River near Clinton, Iowa. On May 5, 1996, the Union Pacific Railroad Company ("Union Pacific") was the owner of the Clinton Railroad Bridge, located on the Mississippi River at or near Mile 518.0 UMR, at Clinton, Clinton County, Iowa.

On May 5, 1996, the M/V Miss Dixie an/or its tow struck Union Pacific's Clinton Railroad Bridge causing damage to both the bridge and the M/V Miss Dixie and/or its tow. Union Pacific brought a lawsuit alleging that its bridge was damaged by the negligence of the crew of the M/V Miss Dixie and/or by the unseaworthiness of the vessel. The lawsuit was brought under the District Court's admiralty and maritime jurisdiction within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. In response, Kirby denied its crew was negligent or that its vessel was unseaworthy and alleged that Union Pacific itself was negligent in the care and maintenance of the Clinton Railroad Bridge, and further alleged the defense of a set-off for damage sustained by the M/V Miss Dixie and/or its tow.

The Clinton Railroad Bridge was originally built in 1888 and modified in 1907. It was constructed in accordance with permits issued by the United States Coast Guard pursuant to 33 U.S.C. § 401. On the date of the allision, the bridge was operating under these permits.

However, a separate federal statute, the Truman-Hobbs Act, authorizes the United States Coast Guard to order bridge-owners to alter bridges when they "unreasonably obstruct the free navigation of any navigable waters of the United States." 33 U.S.C. § 512. The Truman-Hobbs Act further provides a mechanism for the owner of such a

bridge to share the expense of altering the bridge with the federal government. *See* U.S.C. §§ 516-518. On February 28, 1996, the Coast Guard issued an Order to Alter pronouncing the bridge to be an unreasonable obstruction to navigation.

The Clinton Railroad Bridge is the site of repeated allisions. On September 22, 1995, in a Detailed Report[1] on the obstructive character of the Clinton Bridge, the Commander of the Second United States Coast Guard District reported on its notorious history:

> [c]ollisions between the bridge and vessels have caused significant damage to both. Three hundred twenty eight collisions occurred between 1981 and 1991. The restrictive opening causes unreasonable delays to river traffic because significant reductions in speed are required to safely transit the bridge. Under ideal conditions, a time consuming transit at reduced speed is required. The hazards are exacerbated by high water, inclement weather conditions and the proximity of other riverfront facilities. In spite of frequent use helperboats and other precautions, contact with the bridge structure is commonplace and collision damage is prevalent. Excessive collisions and complaints from the river industry prompted the preliminary investigation of the bridge.
>
> [The Detailed Report] concludes that the bridge is an unreasonable obstruction to navigation because its horizontal opening is inadequate for modern commercial tow size and the physical condition of the river.

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[1] The Coast Guard's Order to Alter, the Detailed Report on the Obstructive Character of the Clinton Railroad Bridge, and the Decision Analysis are all part of an exhibit that was made a part of the parties' stipulated facts, which was filed before the District Court.

Moreover, the Detailed Report also states that:

> [t]he present bridge structure was constructed in 1907, consisting of three fixed truss spans and a 460 foot swingspan. The horizontal clearance in the channel swingspan is 177.5 feet. Since the bridge was constructed there have been significant changes to both the navigability of the Upper Mississippi River and the size, type, and character of the vessels that transit the bridge. Additional difficulties to navigation include a highway bridge constructed immediately upstream, along with development on both descending banks.

The Detailed Report also criticizes the poor position of the Clinton Bridge:

> It is positioned immediately below a bend in the river that makes it extremely difficult for tows to line up with the bridge on down bound transits. This is compounded by a severe cross current toward the Illinois bank that is difficult to compensate for and is exacerbated when Lock and Dam 13 is open.

Finally, the Detailed Report concluded as follows:

> Based upon this detailed report, the Clinton RR Bridge, Mile 518.0, Upper Mississippi River presents an unreasonable obstruction to navigation.

* * * *

1. A horizontal clearance of 177.5 feet is roughly half the clearance of the authorized Corps of Engineers channel width of 300 feet. The horizontal clearance provided is not adequate for the standard 105 foot width of the tows.

2. When the bridge was originally built in 1888 and modified in 1907 it was conditional on the rebuilding of the bridge when required by navigational interests.

> The Second [Coast Guard] District considers the Clinton RR Bridge a hazard to navigation, an opinion which the Navigational Benefits support. From a navigational standpoint, the Upper Mississippi River commercial users would be best served by a Clinton RR Bridge which would provide a properly located horizontal opening of at least 300 feet.

Subsequent to the Detailed Report, on November 30, 1995, the Chief of the U.S. Coast Guard's Office of Bridge Administration approved a Decision Analysis concerning the navigation problems created by the Clinton Railroad Bridge. Among the many findings of the Decision Analysis, the Coast Guard states:

> The Sabula Railroad Drawbridge does not affect navigation at the Clinton Railroad Drawbridge. However, the pier configuration of the Clinton Highway Bridge and its close proximity to the Clinton Drawbridge does affect downstream navigation by not allowing a downbound tow to align properly with the current on its approach to the Clinton Drawbridge.

In addition, the Decision Analysis also stressed the significant changes that have taken place in the river transportation industry during the past ninety-four years since the bridge was constructed:

> When the Clinton Drawbridge was originally built, the average tow consisted of four to five wooden barges, powered by an 1800 horsepower wooden towboat. Today, commercial tows are significantly larger, heavier, and carry more cargo than the older and smaller wooden boats, which used the river when the Clinton Drawbridge was initially constructed. An average tow using the UMR [Upper Mississippi River] consists of 15 steel barges, powered by a 3200 to 4800 horsepower steel towboat. A typical barge measures 195 feet long by 35 feet wide. Barges in tows are usually arranged 5 long

and 3 wide. A typical towboat (without barges) is 150 feet long and 40 feet wide and when coupled with its barges has an overall dimension of approximately 1200 feet long and 105 feet wide. Modern tows are more than twice the length of the earlier commercial tows that operated in the area. An average of 20,135,250 tons of cargo per year are transported past this bridge. These cargoes consist primarily of grain, coal, and petroleum products.

According to the Decision Analysis Summary:

2. The restricted channel width, position of the bridge, shallow water depths near the bridge, severe cross currents and proximity of the Clinton (U.S. Route 30) Highway Bridge all combine to pose serious problems in getting aligned for the bridge approach even for the most experienced pilots.

3. During periods of high water the narrow horizontal opening of the bridge makes it virtually impossible for tows to transit the bridge without contacting the bridge piers or protective cells.

In his Order to Alter, because the Clinton Railroad Bridge was deemed to present an unreasonable obstruction to navigation, the Commandant of the Coast Guard directed the Union Pacific to alter the bridge such that:

1. The moveable span shall provide a horizontal clearance of no less than 300 feet measured normal to the channel and a vertical clearance of no less than 52 feet above the two percent flowline or 60 feet above normal pool, whichever is greater, in the open position. These clearances are necessary for the reasonable needs of navigation.

Based upon the Coast Guard's Order to Alter, the District Court found that the *Oregon* presumption of fault (158 U.S. 186) in favor of the bridge had been overcome and, further-

more, that the *Pennsylvania* rule's presumption of fault (86 U.S. 125) resulting from the violation of 33 U.S.C. § 512, applied against the railroad. On appeal, the Eighth Circuit Court of Appeals disagreed, finding that a violation of 33 U.S.C. § 512 was not sufficient to overcome the *Oregon* presumption. This Petition for Writ of *Certiorari* followed.

REASONS FOR GRANTING THE PETITION

I. *Certiorari* should be granted because the decision of the Eighth Circuit Court of Appeals conflicts with a decision of the Seventh Circuit Court of Appeals on an important issue.

The issue presented by this Petition is of critical importance to both the marine and railroad industries. The decision of *Union Pacific Railroad Company v. Kirby Inland Marine, Inc.*, 296 F.3d 671 (8th Cir. 2002) creates a troublesome inconsistency in the application of century-old maritime law that applies to vessel-bridge collisions, which are known as allisions in admiralty law, on our nation's navigable waterways, in general, and the Mississippi River, in particular. The confusion arises because the holding directly conflicts with another recent decision that was made by the neighboring Seventh Circuit Court of Appeals, *I&M Rail Link, LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012 (7th Cir. 2000), which involved similar facts.[2] In short, the two appellate courts disagree on the meaning and significance of 33 U.S.C. § 512, which is contained within the Truman-Hobbs Act, 33 U.S.C. §§ 511-23. Furthermore, these two decisions have created an irreconcilable conflict of law that significantly impacts the marine and railroad industries, as well as navigable waterways throughout this country.

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[2] The Eighth Circuit Court of Appeals described the *I&M* case as "strikingly similar." *Union Pacific*, 296 F.3d at 677.

More specifically, the *Union Pacific* decision reflects an interpretation of the Act, including 33 U.S.C. § 512, which was flatly rejected in *I&M*. The Court of Appeals for the Eighth Circuit found that:

> Looking at the Truman-Hobbs Act as a whole, a § 512 finding that a bridge is an 'unreasonable obstruction to navigation' is not a direct comment on the safety of the bridge. Instead, the Coast Guard labels a bridge an unreasonable obstruction in order to facilitate the funding process.

Union Pacific, 296 F.3d at 675.

In stark contrast, while the Seventh Circuit Court of Appeals acknowledged the obvious funding aspects of the Act, it forcefully rejected the view that the Act was *only* a funding procedure. In the words of Judge Easterbrook:

> But [funding] is not *all* the Act does. Section 512 forbids maintenance of a bridge that has become an unreasonable obstruction, and § 519 imposes civil and criminal penalties on bridge owners that fail to comply with a renovation order. What is more—and what is more important—the Act supplies funding *only if* a bridge has become an unreasonable obstruction to navigation. I&M treats the unreasonable-obstruction finding as a matter of form, a kind of administrative wink and nudge needed to liberate public funds. But we have no reason to think that Congress contemplated fraudulent findings; both the structure of the Act and the evident seriousness with which the Coast Guard takes its task show that public funds are available only if the bridge *really is* an unreasonable obstruction to navigation.

I&M, 198 F.3d at 1014-1015. (Emphasis in the original).

Consistent with its view that 33 U.S.C. 512 is not a meaningless provision of a larger funding procedure, *I&M* also found that:

> 33 U.S.C. 512, which provides that no bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States, applies to all bridges, not just those built without permits.

Id. at 1013.

Accordingly, in the Seventh Circuit, a Coast Guard finding that a bridge is an unreasonable obstruction to navigation is a direct comment on the safety of the bridge and 33 U.S.C. § 512 imposes an affirmative duty on all bridge-owners not to unreasonably obstruct navigation. The Seventh Circuit Court of Appeals clearly affords a vibrancy to 33 U.S.C. § 512 outside the larger Truman-Hobbs Act.

The conflicting decision of the Eighth Circuit Court of Appeals effectively means that there is currently one interpretation of 33 U.S.C. § 512 for the east bank of the Mississippi River and another for the west. Such a difference of opinion may not have been of exceptional importance if the cases involved issues solely involving land-based parties. However, 33 U.S.C. § 512 inherently involves vessels and their navigation through bridges that physically connect the two judicial circuits. Therefore, the current split will result in the proverbial race to the courthouse following allisions along the Mississippi River. Bridge and vessel interests will respectively head to courts in different circuits to file suit against each other to recover for their damages.

In the present case, which involves an allision between the M/V Miss Dixie and the Clinton, Iowa Railroad Bridge, the District Court initially applied a presumption of negligence against the vessel owner, Kirby. *Union Pacific v. Kirby*, 2001 WL 1689710 *1, 2001 A.M.C. 2857, 2258 (S.D.IA.). Indeed, pursuant to Supreme Court precedent, under certain circumstances, a presumption of fault can arise against a moving vessel when it makes contact with a stationary bridge. *The Oregon,* 158 U.S. 186, 15 S.Ct. 804

(1895). However, the District Court found that at the time of the occurrence, the bridge was in direct violation of a federal statute, 33 U.S.C. § 512, which is part of the Truman-Hobbs Act and expressly forbids any bridge from unreasonably obstructing navigation. *Id.*

The District Court's ruling that the bridge was in violation of federal law, 33 U.S.C. § 512, was based on the Coast Guard's Order to Alter, which was admitted into evidence under Federal Rule of Evidence 803(8)(c). *Id.* at 2. The Coast Guard issued the Order to Alter on February 28, 1996. *Id.* at 1. In short, the District Court found that the Union Pacific's bridge was an unreasonable obstruction to navigation and that Kirby had thereby "overcome" the *Oregon* presumption. *Id.* at 1-2.

Furthermore, the District Court also made reference to another longstanding principle of maritime law, again established by the Supreme Court. In the words of the District Court, "where any party violates a statutory or regulatory rule designed to prevent collisions, that party has committed *per se* negligence and under the *Pennsylvania* rule, has the burden of proving that its statutory fault was not a contributing cause of the accident." *Id. citing The Pennsylvania*, 19 U.S. 125, 136, 22 L.Ed. 148 (1873). In light of the fact that the bridge was found to be in violation of 33 U.S.C. § 512, a statute or regulatory rule relating to safety and navigation, the District Court correctly found that a presumption of negligence applied against the bridge-owner. *Id.* at 2, *citing Illinois Constructors Corp. v. Logan Transp., Inc.*, 715 F.Supp. 872, 879 (N.D.Ill. 1989).

By choosing not to follow the District Court's decision, the Eighth Circuit Court of Appeals created a disparity of law between it and the Seventh Circuit Court of Appeals involving important questions arising out of the interaction of two landmark United States Supreme Court decisions, *The Oregon* and *The Pennsylvania,* and the interplay be-

tween their competing presumptions of fault; and 33 U.S.C. § 512 and the remainder of Truman-Hobbs Act. As a result, whether the Eighth or Seventh Circuit Court of Appeals' interpretation of 33 U.S.C. § 512 is correct has serious consequences for the litigants as well as all marine and railroad transportation companies similarly situated.

In this regard, if 33 U.S.C. § 512 actually means what it says and thereby imposes an affirmative duty on all bridge-owners not to unreasonably obstruct navigation, as found by *I&M* and numerous lower courts,[3] then the District Court was correct when it found that Kirby had overcome the *Oregon* presumption. In addition, the Seventh Circuit Court of Appeals' reasoning in *I&M* also supports the District Court's application of the *Pennsylvania* rule in favor of Kirby or, at the very least, the elimination of any presumption in favor of either party.

As this Court has noted, a principal purpose for which *certiorari* jurisdiction is used is to resolve conflicts among the United States courts of appeals concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857 (1991). Here, the *Union Pacific* and *I&M* decisions regarding the meaning of 33 U.S.C. § 512 are irreconcilable. Accordingly, the Petitioner's Writ of *Certiorari* should be granted.

Furthermore, interpretation of the relevant federal statute and the general application of a presumption in favor of either bridges or vessels is an exceptionally important matter considering the importance of vessel and rail traffic and the number of allisions that occur with Truman-Hobbs

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[3] *Nassau County Bridge Authority v. Tug Dorothy McCallister*, 207 F.Supp. 167 (E.D.N.Y. 1962); *Board of Commissioners v. Gypsum Transportation, Ltd.*, 263 So.2d 385, 1972 A.M.C. 2594 (La. Ct. of Appeals, 4th Dist. 1972); and *Connecticut v. Tug Cynthia Moran*, 607 F.Supp. 24 (D.C.Conn. 1984).

Act bridges. For example, according to the Coast Guard, the Clinton, Iowa railroad bridge, which is just one of many Truman-Hobbs designated bridges along the Mississippi River, was struck three hundred and twenty-eight (328) times between 1981 and 1991. To the railroad and marine transportation industries, this issue, which involves waterways and bridges trafficked by commercial vessels throughout the United States, is of exceptional importance and has implications far beyond the instant facts, which justifies the exercise of this Court's discretionary jurisdiction.[4]

II. *Certiorari* should be granted because the decision of the Eighth Circuit Court of Appeals is wrong.

A. The *Oregon* presumption is inapplicable.

The federal government has long been ordering the removal and alteration of unreasonable obstructions to navigation. Indeed, the Historical Notes following 33 U.S.C. § 511 (1986) direct our attention to 1952 U.S. Code Cong. and Adm. News, p. 2294. Attached to the report from Congress that is found at this citation is a letter from the then Secretary of the Army, Frank Pace, Jr., which clearly establishes that the federal government was ordering the elimination of unreasonable obstructions to navigation well before the federal funding of bridge renovations was made available. *Id.* at 2297-2298.

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[4] Kirby notes that the railroad interests have also expressed their desire to have this Court settle this important issue. In this regard, the railroad interests filed a petition for *certiorari* after the Seventh Circuit Appellate Court issued its decision in *I&M*, however, said petition was denied. *See* 531 U.S. 917, 121 S.Ct. 276 (2000). Now that a conflicting Eighth Circuit Court of Appeals decision has been rendered, Kirby submits this reoccurring issue is ripe for Supreme Court review.

Interestingly, the present conflict between the circuits arises out of legislation that was drafted in response to another nearly century-old Supreme Court case. Indeed, it has been held in words equally applicable here:

> It must be remembered that the Truman-Hobbs Act was passed by Congress in response to a ruling by the U.S. Supreme Court that, under the General Bridge Act, the Secretary of War was authorized to require alteration of a bridge which he determined to be an unreasonable obstruction to navigation without compensating the bridge owner for the cost of the alteration work. *Union Bridge Co. v. Unites States*, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523 (1907). In response, Congress passed the Truman-Hobbs Act which imposes on the Government the total cost incurred in the interest of navigation, with suitable apportionment of cost to the bridge owner covering special improvements to the benefit of the railroad . . . .

Burlington Northern Railroad, WAB Case No. 86-07 (June 30, 1986) (Member Dunn).

However, contrary to the Eighth Circuit Court of Appeals' findings, simply because the present location of the rule prohibiting unreasonable obstructions to navigation, 33 U.S.C. § 512, is in the middle of a more recent funding apportionment scheme does not change its original meaning. Indeed, federal funding through the Truman-Hobbs Act is still tethered to a factual finding that a particular bridge is an unreasonable obstruction to navigation. Thus, pursuant to the Coast Guard's Order to Alter, there can be no real dispute that the Clinton, Iowa Railroad Bridge really is an unreasonable obstruction to navigation.

The significance of violating § 512 is underlined by federal regulations. According to 33 C.F.R. § 116.01:

> All bridges are obstructions to navigation and are tolerated only as long as they serve the needs of land transportation while allowing for the reasonable needs of navigation.

Therefore, as a matter of law, the Clinton, Iowa Railroad Bridge is "intolerable" as it no longer allows for the reasonable needs of navigation.

Applying the *Oregon* presumption under such circumstances, as was done by the Eighth Circuit Court of Appeals, defies its original purpose. There are simply no other case decisions suggesting that this Court ever contemplated such a broad application of the *Oregon* presumption. Indeed, the very reason for presuming that a moving vessel is negligent when it strikes a stationary object is because "such accidents simply do not occur in the ordinary course of things unless the vessel has been mismanaged in some way." *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977) *citing Patterson Oil Terminals, Inc. v. The Port Covington*, 109 F.Supp. 953, 954 (D.C.PA. 1952). Considering the fact that Clinton, Iowa Railroad Bridge is "unreasonable" and "intolerable" for the purposes of modern navigation, it can hardly be said that vessels transiting beneath it are operating in "the ordinary course of things."

Moreover, admiralty courts are courts of equity. *See Vaughan v. Atkins*, 369 U.S. 527, 530, 82 S.Ct. 997, 999 (1962). In this regard, blindly applying the *Oregon* presumption in favor of a bridge, which has been found to be an unreasonable obstruction to navigation, and against a vessel transiting its span, defies all equitable principles of law. Accordingly, the Eighth Circuit Court of Appeals was wrong when it applied the *Oregon* presumption in favor of the Union Pacific.

B. The *Pennsylvania* rule applies in favor of Kirby.

In addition to finding the *Oregon* presumption inapplicable, the appellate court below should have applied the *Pennsylvania* rule in favor of Kirby. Applying the *Pennsylvania* rule would act to trump the *Oregon* presumption or, at the very least, level the playing field so that neither party enjoys a presumption. Under the latter scheme, Union Pacific would bear both the burden of proof and production just like any other plaintiff in a negligence action.

The Court of Appeals for the Eighth Circuit adopted a test for the application of the *Pennsylvania* rule used by the Seventh Circuit Court of Appeals in *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995). According to the *Folkstone* test:

> For the *Pennsylvania* rule to apply, three elements must exist: (1) proof by a preponderance of the evidence of violation of a statute or regulation that imposes a mandatory duty; (2) the statute or regulation must involve marine safety or navigation; and (3) the injury suffered must be of a nature that the statute or regulation was intended to prevent.

Id. at 1047.

While this test has three elements, the Eighth Circuit Court of Appeal's decision makes clear that the touchstone is the second element; the statute or regulation must involve marine safety or navigation. However, in its opinion, in spite of the fact that the test is in the alternative (i.e. safety *or* navigation), the appellate court solely discusses whether § 512 involves maritime *safety* and totally ignores the question of whether it involves *navigation*. The appellate court not only erred in its application of the safety requirement but also in failing to even consider the statute's obvious navigational aspects.

First, in regard to "safety," the *Union Pacific* court stated, "we find the Truman-Hobbs Act is a funding statute and not a safety statute." *Union Pacific,* 296 F.3d at 674. However, this conclusion is contrary to legislative history, modern day statements of Congress, and the federal regulations that govern the implementation of the Act.

In regard to legislative history, the Truman-Hobbs Act was passed in response to *Union Bridge Company v. United States*, 204 U.S. 364, 27 S.Ct. 367 (1907), which held that a government ordered alteration to an unreasonable obstruction to navigation did not amount to a taking of private property for public use. *See Burlington Northern Railroad*, WAB Case No. 86-07 (June 30, 1986); and 1952 U.S. Code Cong. and Adm.News, p. 2294-2298. In *Union Bridge*, this Court noted that the earliest legislation prohibiting the unreasonable obstruction of navigable waters appeared in 1884 at 23 Stat. at L. 133, 148, chap. 229.[5] *See Union Bridge*, 204 U.S. at 367. In relevant part, that original statute reads:

> That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now or hereafter to be constructed over any of the navigable waters of the United States . . . is an obstruction to the free navigation of such waters by reason of difficulty in passing the draw-opening or the raft span of said bridge by rafts steamboats, or other watercraft, it shall be the duty of the said Secretary on satisfactory proof thereof to require the company or person owning, controlling, or operating said bridge to cause such aids to the passage of said draw-opening or of said raft-span . . . to be constructed, placed, and maintained, at their own cost and expense, in the form of booms, dikes, piers, or

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[5] It should be noted that the 1884 statute actually predates *The Oregon*, 158 U.S. 186, 15 S.Ct. 804 (1895).

> other suitable and proper structures for the guiding of said rafts, steamboats, and other water-craft safely through said opening or span . . . .

In short, the original statute authorizing the government to order the alteration of unreasonable obstructions to navigation expressly states that its purpose was to provide for the safe passage of watercraft through said obstructions. Modern day statements of Congress regarding the Truman-Hobbs Act are consistent with the language found in the 1884 statute. Indeed, discussing the Truman-Hobbs Act, Congress recently explained, "the purpose of altering these bridges is to improve the safety of marine navigation under the bridge." H.R. Conf. Rep. No. 107-722, 107th Cong., 2d Sess. 40 (2002).

The federal regulations that govern the implementation of the Act also stress safety. In this regard, 33 C.F.R. § 116.25(a) states the following:

> The District Commander will hold a public hearing near the location of the bridge to provide the bridge owner, waterway users, and other interested parties the opportunity to offer evidence and be heard, orally or in writing, as to whether any alterations are necessary to provide reasonably free, safe, and unobstructed passage for waterborne traffic.

Accordingly, there can be no doubt that the Truman-Hobbs Act was drafted to maintain marine safety.

Second, with respect to "navigation", in addition to its own express terms, 33 U.S.C. § 512's relationship to navigation is also supported by its legislative history and its interpretation by the courts. In regard to legislative history, as discussed above, federal legislation has prohibited unreasonable obstructions to navigation long before the federal funding of bridge renovations was made available. *See* 1952 U.S. Code Cong. and Adm. News, p. 2294-2298. While fed-

eral funding may now be available to help alter a bridge, 33 U.S.C. § 512 still prohibits unreasonable obstructions in the interests of free navigation.

In addition, the limited legislative history that was cited by the Eighth Circuit Court of Appeals at 296 F.3d 674 relates only to the Truman-Hobbs Act's funding apportionment scheme and not the federal government's longstanding authority to order the removal and alteration of unreasonable obstructions to navigation. *See* H.R. Rep. No. 1447, 76th Cong., 1st Sess. 1-3 (1939). In fact, Report 1447 expressly states, "this bill leaves undisturbed the present law which requires the original bridge . . . to be reconstructed or altered on orden of the Secretary of War." *Id.* at 2. Accordingly, the appellate court's reliance on the history relating to the funding apportionment scheme was misplaced.

In regard to case law, in *Board of Commissioners v. Gypsum Transportation, Ltd.*, 263 So.2d 385, 390, 1972 A.M.C. 2594, 2601 (La. Ct. of Appeals, 4th Dist. 1972), it was held:

> Any bridge is an obstruction to the *free* navigation of a waterway, since it obviously restricts traffic in the waterway to the draw opening. This restriction is permitted because of the necessity of land transportation to commerce and convenience, but there must be a balance between the rights and the needs of land traffic and the paramount right to use of waterway by watercraft. This balance is achieved by prohibiting the *unreasonable* obstruction of navigation by a bridge. See 33 U.S.C. § 512.

(Emphasis in original). This reasoning is entirely consistent with the notion that the long-standing prohibition against unreasonable obstructions to navigation survives today in 33 U.S.C. § 512 despite the fact that it is found in the middle of the Truman-Hobbs Act.

Similarly, the Seventh Circuit Court of Appeals has held that:

> Admiralty law makes clear that a bridge may not unreasonably obstruct free navigation. Indeed, federal statutory law stipulates that bridges may not 'unreasonably obstruct the free navigation of any navigable waters.' 33 U.S.C. § 512.

Folkstone, 64 F.3d at 1048.

As neither of these two cases had anything to do with the funding of bridges, they are irreconcilable with the finding by the *Union Pacific* appellate court that the entirety of the Truman-Hobbs Act is a mere funding statute. In fact, there is no indication in *Folkstone* or *Gypsum* that those cases involved bridges that had been found to be unreasonable obstructions to navigation by the Coast Guard. Clearly, *Folkstone*, *Gypsum*, and *I&M* recognize that 33 U.S.C. § 512 is a safety and navigation statute that is applicable to all bridges, just like the navigation rules of the road are applicable to all vessels.

Finally, consistent with 33 U.S.C. § 512 being a safety and navigational statute, it has previously been cited as a basis for applying the *Pennsylvania* rule. Indeed, in *Nassau County Bridge Authority v. Tug Dorothy McAllister*, 207 F.Supp. 167, 171 (E.D.N.Y. 1962), a case involving an allision between a tug and a bridge, the court held that:

> Title 33 U.S.C.A §§ 494, 499, and 512 are applicable to the instant case. Violation of its statutory duty makes the bridge presumptively negligent and liable under the doctrine of *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148.

In light of the statute's own terms, its legislative history, modern day statements of Congress, the regulations that govern its implementation, and its application by the courts, it is clear that 33 U.S.C. § 512 of the Truman-Hobbs

Act is *both* a navigation and safety statute. Accordingly, the appellate court below was mistaken in not finding that the touchstone element of the *Folkstone* test was satisfied.

With this second requirement satisfied, the remaining two elements fall into place. Turning to the first element of the *Folkstone* test, the Court of Appeals for the Eighth Circuit wrongly found that the Truman-Hobbs Act does not impose a specific duty because once the Coast Guard concludes that a bridge violates § 512, the bridge owner is "only required to prepare a plan for altering a bridge." *Union Pacific*, 296 F.3d at 675. However, this conclusion overlooks the enforcement powers provided to the federal government by statute and regulation.

As discussed above, once it was declared to be an unreasonable obstruction to navigation, the Clinton, Iowa Railroad Bridge was no longer an obstruction that could be "tolerated." 33 C.F.R. § 116.01(a). In addition, the Coast Guard will order the alteration of any bridge that unreasonably obstructs navigation. 33 C.F.R. § 116.01(c). Moreover, 33 U.S.C. § 519 sets out various noncompliance penalties, including:

> Any bridge owner who shall willfully fail or refuse to comply with any lawful order of the Secretary . . . shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished . . . by a fine not exceeding $5,000, and every month such bridge owner shall remain in default shall be deemed a new offense and subject such bridge owner to additional penalties therefore . . . Secretary may, upon failure or refusal of any bridge owner to comply with any lawful order issued . . . cause the removal of any such bridge and accessory works at the expense of the bridge owner . . . The removal of any bridge may be enforced by injunction [. . .] or other summary process.

The Seventh Circuit Court of Appeals recognized the specific duty imposed by these regulations and statutes in *I&M*, 198 F.3d at 1014. In the *I&M* case, it was found that the Truman-Hobbs Act forbade maintenance of a bridge that has become an unreasonable obstruction and to impose civil and criminal penalties on bridge-owners that fail to comply with a renovation order. *Id.* The decision of the Eighth Circuit Court of Appeals inexplicably failed to even acknowledge 33 U.S.C. § 519.

Based on the above, the Truman-Hobbs Act clearly imposes a greater duty than that found by the appellate court below. The duty is exactly what 33 U.S.C. § 512 states, "no bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States." The Union Pacific is in violation of this statute. The Eighth Circuit Court of Appeals therefore erred in failing to recognize the specific duty imposed by the Truman-Hobbs Act.

In regard to the third element of the *Folkstone* test, whether the Act was drafted to prevent a specific sort of injury, the appellate court was again improperly distracted by the subsequently adopted funding scheme. In this regard, the Court of Appeals for the Eighth Circuit mistakenly found that "although the bridge alterations may reduce the amount of allisions, this is a collateral consequence and not a direct purpose of the Truman-Hobbs Act." *Union Pacific*, 296 F.3d at 675.

However, as discussed above, according to Congress, "the purpose of altering these bridges is to improve the safety of marine navigation under the bridge." H.R. Conf. Rep. No. 107-722, 107th Cong., 2d Sess. 40 (2002). In this regard, an allision is the danger to marine traffic passing under a bridge that has been found to be an unreasonable obstruction to navigation.

In addition, the Coast Guard may conduct a Preliminary Investigation of a bridge for the purposes of determining whether it is an unreasonable obstruction to navigation based upon its accident history alone. 33 C.F.R. § 116.10(b). Most importantly, federal funding is only available after a factual finding has been made that the bridge is an unreasonable obstruction to navigation and an order to alter has been issued. Clearly, 33 U.S.C. § 512 was drafted to prevent a specific sort of injury, allisions. Accordingly, the *Folkstone* test is satisfied and the District Court correctly applied the *Pennsylvania* rule in favor of Kirby. Clearly, on appeal, the Eighth Circuit Court of Appeals reached the wrong decision when it rejected the District Court's conclusion and overlooked the various points discussed above, which are supported by the relevant law.

CONCLUSION

For all of the above reasons, the Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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